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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

AMAZON.COM, INC.,

Movant,

v.

APPLE INC.

Respondent.

Misc. Case No.

Action pending in the United States District Court for the Western District of Washington (No. 2:14-CV-01038-JCC)

MISCELLANEOUS ACTION: NOTICE OF MOTION AND MOTION TO TRANSFER OR COMPEL COMPLIANCE WITH SUBPOENA; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: November 4, 2015
Time: 9:00 a.m.

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that on November 4, 2015 at 9:00 a.m. in the United States District Court for the Northern District of California, 280 South First Street, San Jose, California, Amazon.com, Inc. ("Amazon") will move to compel Apple Inc.'s ("Apple") compliance with a subpoena issued by the United States District Court for the Western District of Washington (the "Subpoena") in an action pending in that district and captioned *Federal Trade Commission v. Amazon.com, Inc.*, Cause No. 2:14-CV-01038-JCC. Apple served written objections to the Subpoena on September 23, 2015, and has refused to produce any of the documents requested therein.

Amazon asks that this Court transfer this subpoena-related motion for resolution by the issuing Court in the Western District of Washington, pursuant to Federal Rule of Civil Procedure 45(f). Alternatively, Amazon requests that Apple be ordered to comply with the Subpoena.

In accordance with Federal Rule of Civil Procedure 37(a)(1) and Civil Local Rule 37-1, Amazon certifies that it has conferred in good with counsel for Apple, but was unable to resolve the issues raised in this motion.

DATED: September 28, 2015

PERKINS COIE LLP

By: Julie E. Schwartz
Julie E. Schwartz

Attorneys for Amazon.com, Inc.

MEMORANDUM OF POINTS AND AUTHORITIES

I. ISSUES TO BE DECIDED

1. Whether exceptional circumstances exist that warrant transferring this motion to the United States District Court for the Western District of Washington.

2. Whether Apple should be compelled to comply with the Subpoena at issue.

II. INTRODUCTION

On September 8, 2015, Amazon served Apple with a Subpoena in connection with an action pending in the United States District Court for the Western District of Washington (the "Issuing Court"), in which Amazon is the defendant (the "Underlying Action"). In the Underlying Action, the plaintiff Federal Trade Commission ("FTC") alleges that Amazon's billing practices relating to "in-app purchases" constitute an unfair business practice, in violation of Section 5 of the FTC Act. Amazon's Subpoena to Apple seeks information about Apple's in-app purchase policies and practices that are relevant to the Underlying Action. Despite Amazon's agreement to narrow the Subpoena and its good faith efforts to try to avoid motion practice, Apple has refused to produce any documents in response to the Subpoena.

As an initial matter, this Court need not consider the propriety of the Subpoena or the validity of Apple's objections because exceptional circumstances exist that warrant transferring this motion to the Issuing Court pursuant to Federal Rule of Civil Procedure 45(f). Specifically:

- Similar motion practice is before the Issuing Court in the Underlying Action, and failure to transfer this motion could result in inconsistent rulings that impair Amazon's ability to present its defenses;

- Resolution of the motion would require the Court to conduct duplicative and unnecessary review given the similar motions before the issuing court;

- Resolution of this motion requires consideration of the issues presented in the Underlying Action, and the Issuing Court is more familiar with the relevant issues as well as any implications that resolution of the motion will have on the Underlying Action.

Alternatively, if the Court declines to transfer this motion, it should compel Apple to comply with the Subpoena, as narrowed by Amazon on September 25. As discussed below, the

Subpoena seeks information that is directly relevant to the Underlying Action, and compliance would impose minimal burden on Apple.

III. RELEVANT FACTUAL BACKGROUND

A. The Underlying Action

The Subpoena pertains to a case pending in the United States District Court for the Western District of Washington, *Federal Trade Commission v. Amazon.com, Inc.*, Cause No. 2:14-CV-01038-JCC. Declaration of Jeffrey M. Hanson ("Hanson Decl.") Ex. A. The Underlying Action concerns the practice of "in-app purchasing," which allows customers to purchase content through games and other applications ("apps") on mobile devices such as tablets and phones. *See* Hanson Decl. Ex. B (Compl.), Ex. C (Answer). The FTC's Complaint alleges that Amazon's billing practices as applied to in-app purchases by children were unfair practices under Section 5 of the FTC Act, 15 U.S.C. § 45(n). Hanson Decl. Ex. B (Compl.), ¶¶ 33-35.

To prove its case, the FTC must establish, among other things, that Amazon's customers could not "reasonably avoid" the alleged harm caused by the purported unauthorized in-app purchases and that the alleged harm was not substantially outweighed by countervailing benefits to consumers and to competition. 15 U.S.C. § 45(n). Directly at issue, therefore, are whether (1) Amazon's in-app practices—including disclosures and parental controls—were sufficient for customers to reasonably avoid allegedly unauthorized in-app purchases; (2) Amazon's generous refund policies were sufficient to allow customers to reasonably avoid harm from such purchases; and (3) Amazon's practices and procedures met or exceeded industry standards in the new and developing app market.

B. The Subpoena

Apple was the first company to make available and widely market in-app purchases. The FTC investigated Apple's in-app purchasing practices as they relate to purchases by children, and the investigation resulted in a 2014 Consent Decree between Apple and the FTC.[1] Amazon began

[1] "FTC Approves Final Order in Case About Apple Inc. Charging for Kids' In-App Purchases Without Parental Consent," FTC Press Release (Mar. 27, 2014), at https://www.ftc.gov/news-events/press-releases/2014/03/ftc-approves-final-order-case-about-apple-inc-charging-kids-app.

offering in-app purchasing through apps sold via the Amazon Appstore beginning in November 2011, more than two years after Apple began offering in-app purchases.[2] In July 2014, the FTC initiated the Underlying Action against Amazon, asserting an similar allegations against Amazon that the FTC has alleged in its investigation of Apple. Hanson Decl. Ex. B (Compl.).

Amazon served the Subpoena on Apple on September 8, 2015, and narrowed its requests on September 25. Hanson Decl. Exs. A, E. As narrowed, the Subpoena consists of three targeted requests for documents (collectively, the "Requests"):

- Request No.1: Produce documents, including device screenshots, sufficient to show, from [March 1, 2011, through December 31, 2012], the processes by which an Apple customer would identify, select, and complete an In-App Purchase, including identification, selection, and purchase of the App from which an In-App Purchase could be made and the various controls, protections, disclosures, or notifications utilized by Apple that were intended to avoid accidental In-App Charges (such as parental controls, password prompts, PINs, or other disabling tools or notifications to the customer that such a purchase had been transacted). To the extent the processes changed over time, produce documents sufficient to show how and when the process changed and time period during which each unique process was in effect. ["[T]he request seeks to capture changes in the [in-app] purchase flow relevant to alleged unauthorized or accidental purchases, not cosmetic or other nonsubstantive changes."]

- Request No. 2: Produce documents sufficient to show, from inception of In-App Purchasing to [December 31, 2013], Apple's customer-service policies and practices applicable to In-App Purchases, including the various means and methods by which customers could seek and receive refunds from Apple for unauthorized or accidental In-App Charges. To the extent the policies and practices changed over time, produce documents sufficient to show how and when they changed and the time period during which each unique policy or practice was in effect. ["Amazon seeks documents sufficient to show Apple's public-facing policies and its internal policies and practices that provided guidance to customer service agents on how to handle refund requests for allegedly unauthorized or accidental in-app purchases. . . . If Apple produces documents sufficient to satisfy Request No. 3, then Amazon would be willing to limit (if applicable) the time frame for Request No. 2 to the corresponding period covered by Request No. 3."]

- Request No. 3: Produce documents and data sufficient to show, by month, the number of units and the dollar amount of In-App Charges that were refunded by Apple to its customers; for each refund measure, the percentage of Apple's total In-App Charges (the numerator should be the total number of units or total dollar

[2] *See, e.g.*, Brian X. Chen, "Apple Allows In-App Purchases in Free iPhone Apps," (Oct. 15, 2009), http://www.wired.com/2009/10/in-app-commerce/; Hanson Decl. Ex. B (Compl.) ¶ 8 ("Amazon began billing for in-app charges in November 2011 . . . .").

> amount refunded in a particular month and the denominator should be, respectively, the total number of units or total dollar amount of revenue of In-App Purchases in the corresponding month); and the percentage of Apple's granted In-App Charge refund requests (the numerator should be the total number of refunds granted in a particular month and the denominator should be the total number of In-App Charge refunds requested in that same month). The relevant time period for this request is from inception of In-App Purchasing through November 30, 2014. ["Amazon is willing to limit the request to the periods covered by documents/data provided to the FTC, assuming such information was in fact provided to the FTC."]

Hanson Decl. Exs. A, E (bracketed language reflects Amazon's narrowing of the requests in September 25 correspondence).

Apple served responses on September 23, refusing to produce any documents based on the following objections to the Requests:

- Not relevant and not reasonably calculated to lead to the discovery of admissible evidence because the FTC's dispute with Amazon relates solely to Amazon's conduct (Request Nos. 1, 2, 3)
- Overly broad and unduly burdensome (Request Nos.1, 2, 3)
- Documents are publicly available (Request Nos. 1, 2)
- Improper interrogatory directed to a nonparty (Request Nos. 1, 2, 3)
- Seeks information unrelated to in-app purchases by children (Request Nos. 2, 3)
- Seeks confidential business information (Request No. 2, 3)
- Attorney-client privilege, attorney work product, or any other privilege (Request No. 2)

Hanson Decl. Ex. D.

On September 25, counsel for Amazon and Apple participated in a meet and confer. Hanson Decl. ¶ 6. Later that day, Amazon narrowed the Request Nos. 1-3 and withdrew Request No. 4 altogether. Counsel for Amazon and Apple participated in a second meet and confer on September 28. Hanson Decl. ¶ 7. Despite Amazon's good-faith efforts to reach an acceptable compromise, Apple has refused to produce any documents in response to the Subpoena. *Id.* If

this Court declines to transfer the motion to the Issuing Court, Amazon asks the Court to order Apple to comply with the Subpoena, as narrowed by Amazon.

IV. LEGAL STANDARD

The scope of permissible discovery pursuant to a nonparty subpoena is the same as applies to parties under Federal Rules of Civil Procedure 26 and 34. Fed. R. Civ. P. 45 advisory committee's note to 1991 amendment; *Jacobs v. Quinones*, No. 1:10-CV-02349-AWI-JL, 2014 WL 5426323, at *1 (E.D. Cal. Oct. 23, 2014) ("Rule 45 permits issuance of subpoenas for discovery from a nonparty equivalent to discovery from parties under Rule 34."). A subpoena permits discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1), 34(a). To be relevant, information need only be "reasonably calculated to lead to admissible evidence," and "[t]his requirement is liberally construed to permit the discovery of information which ultimately may not be admissible at trial." *Id.*; *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 680 (N.D. Cal. 2006). "[A] court determining the propriety of a subpoena balances the relevance of the discovery sought, the requesting party's need, and the potential hardship to the party subject to the subpoena." *Gonzales*, 234 F.R.D. at 680.

V. ANALYSIS

This Court need not address the propriety of the Subpoena, or the merits of Apple's objections, because exceptional circumstances exist that warrant transferring this motion to the Western District of Washington. If, however, the Court reaches the merits, it should grant Amazon's motion. The Subpoena seeks information that is directly relevant to the underlying matter, and any burden these requests impose on Apple will be minimal because Apple has already collected and provided to the FTC most, if not all, of the requested documents.

A. Exceptional Circumstances Exist That Warrant Transferring This Motion to the Issuing Court

Federal Rule of Civil Procedure 45(f) provides that "[w]hen the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court . . . if the court finds exceptional circumstances." Fed. R. Civ. P. 45(f). Courts have repeatedly found such exceptional circumstances where there are similar or overlapping motions

pending in different jurisdictions because the possibility of inconsistent rulings could disrupt the underlying litigation. *See Moon Mountain Farms, LLC v. Rural Cmty. Ins. Co.*, 301 F.R.D. 426, 429-30 (N.D. Cal. 2014) (so holding and collecting cases); *F.T.C. v. v. A± Fin. Ctr., LLC*, No. 1:13-MC-50, 2013 WL 6388539, at *3 (S.D. Ohio Dec. 6, 2013) (finding exceptional circumstances where a motion to compel pending in another jurisdiction sought similar documents but was directed to a different party); *Cont'l Auto. Sys., U.S., Inc. v. Omron Auto. Elec., Inc.*, No. 14 C 3731, 2014 WL 2808984, at *2 (N.D. Ill. June 20, 2014) (transferring motion given risk of inconsistent rulings that might disrupt management of the underlying litigation).

Exceptional circumstances also exist where failure to transfer would result in duplicative review, or where the issuing court is "in a better position to rule on the . . . motion . . . due to [its] familiarity with the full scope of issues involved as well as any implications the resolution of the motion will have on the underlying litigation." *Wultz v. Bank of China, Ltd.*, 304 F.R.D. 38, 46 (D.D.C. 2014); *see also Parks, LLC v. Tyson Foods, Inc.*, No. MISC.A. 15-634, 2015 WL 5008255, at *2 (W.D. Pa. Aug. 20, 2015) ("[The issuing] court's familiarity, and the risk that this court will reach a ruling that is inconsistent with the [issuing court's] ruling on already pending discovery motions, are exceptional circumstances that warrant transfer of this matter to that court."); *Moon*, 301 F.R.D. at 30 (exceptional circumstances exist where "[r]uling on the motion to compel would require the Court to duplicate review already conducted by the District of Arizona" and "would also risk disrupting the District of Arizona's management of the underlying litigation.").

Exceptional circumstances are present here. First, Amazon is concurrently filing a motion to compel the production of equivalent documents from the FTC in the Underlying Action, and another motion is already pending in the Issuing Court addressing similar Apple-related issues in the context of a Rule 30(b)(6) deposition of the FTC. Hanson Decl. ¶ 8. Both Apple and the FTC have objected to producing the requested documents, in part, on the basis that other entity should be required to do so if production is ordered. *See* Hanson Decl. Ex. D, at 5 ("Amazon obtained, or had the opportunity to obtain, the information sought in Request 1 from the FTC, a party to the

case"); Ex. F (FTC's Objections to Amazon's Second Set of RFPs). If the Issuing Court were to conclude that Amazon is entitled to the requested documents but should obtain them from Apple, rather than from the FTC, and if this Court were to conclude that documents should be obtained from the FTC, it could lead to the absurd result that neither party would produce the documents to Amazon, despite Amazon's right to obtain them from both. Under these circumstances, with the risk of inconsistent rulings and the prospect of duplicative review by both courts, transfer of the motion is warranted. *See A± Fin. Ctr.*, 2013 WL 6388539, at *3; *Cont'l Auto.*, 2014 WL 2808984, at *2.

Second, resolution of this motion requires assessment of the relevance of the requested documents and the issues presented in the Underlying Action. Because the Issuing Court is necessarily better positioned to evaluate the motion given its familiarity with the case, transfer is warranted. *See Moon*, 301 F.R.D. at 430; *Wultz*, 304 F.R.D. at 46; *Parks*, 2015 WL 5008255, at *2.

In sum, extraordinary circumstances exist that warrant transferring this motion to the Issuing Court for review. If, however, the Court declines to do so, it should order Apple to comply with the Subpoena, as narrowed by Amazon in September 25 correspondence, for the reasons discussed below.

B. Apple Should Be Ordered to Comply with the Subpoena

1. The Requested Documents Are Relevant

The FTC alleges that Amazon's conduct is "unfair" under the Section 5 of the FTC Act. 15 U.S.C. § 45. At a minimum, the FTC must satisfy three prongs to prove its claim: "The Commission shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice [1] causes or is likely to cause substantial injury to consumers which is [2] not reasonably avoidable by consumers themselves and [3] not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). This inquiry requires consideration of relevant industry practice. *See e.g.*, FTC Policy Statement on Unfairness (Dec.17, 1980), contained in *In re Int'l Harvester Co.*, 104 F.T.C. 949, at *96 (1984) ("The second S&H standard [for establishing unfairness] asks whether the conduct violates public

policy as it has been established by statute, common law, industry practice, or otherwise." (emphasis added)); *F.T.C. v. Wyndham Worldwide Corp.*, No. 14-3514, 2015 WL 4998121, at *5 (3d Cir. Aug. 24, 2015) ("In 1994, Congress codified the 1980 Policy Statement at 15 U.S.C. § 45(n)."); *cf. Donohue v. Apple, Inc.*, 871 F. Supp. 2d 913, 928 (N.D. Cal. 2012) (plaintiff asserting that Apple's conduct was "contrary to industry standards" and therefore "unfair" under California's Unfair Competition Law).

Industry practice is particularly relevant here, where Amazon's in-app business practices were launched and refined in a new and innovative market after the incumbents had become established and had affected consumer expectations. Moreover, the FTC has not issued any rulemaking that articulates standards relating to unfair acts or practices that would apply to in-app purchases by children. The FTC has also failed to issue any interpretive rules, statements of policy, or other guidance documents that articulate requirements for in-app billing practices or that otherwise could have put Amazon on notice of the specific standards to which the FTC seeks to hold Amazon. Thus, Amazon and the Issuing Court are left with assessing, at minimum, the industry practice, which naturally begins by reviewing the practices of the company that popularized the practice (Apple). Comparison of Amazon's practices with those of its primary competitors in the in-app market—established and respected companies, not fly-by-night operators—is probative of whether Amazon's practices met or exceeded industry standards, and whether Amazon's practices fell below, met, or exceeded consumers' expectations.

To meet its burden, the FTC must prove, among other things, that the alleged harm from the purported unauthorized in-app purchases was not reasonably avoidable by consumers. 15 U.S.C. § 45(n). Because Apple was the first company to make available and widely market in-app purchases, many of Amazon's customers likely learned about in-app purchasing before migrating to Amazon's in-app platform, which launched more than two years after Apple's.[3] What those former Apple customers understood of the market—from the disclosures and purchase protocols previously implemented by Apple—is probative of whether Amazon's

[3] *See supra* note 2.

customers knew of the myriad ways in which they could prevent their children from making accidental in-app purchases.

The FTC must also show that the purported harm was not substantially outweighed by the benefits to consumers and competition. 15 U.S.C. § 45(n). It is axiomatic that a comparison of Amazon's in-app billing practices—including its disclosures, parental controls, password requirements, and liberal refund policies—to Apple's in-app billing practices is probative of the benefits Amazon provided to both its customers and to competition.

Furthermore, when asked what specific guidance the FTC gave companies like Amazon with respect to in-app purchasing, the FTC repeatedly referred to its consent decree with Apple, which was announced in early 2014. *See, e.g.*, Hanson Decl. Ex. G (Rule 30(b)(6) Tr. 119:23-121:3), Ex. H, at 9-10 ("[T]he FTC's settlement agreement with Apple Inc. concerning its billing practices for in-app charges defines express informed consent in terms that allow considerable flexibility in the precise process or procedure chosen for compliance."). By referring Amazon almost exclusively to Apple's in-app billing practices, the FTC has necessarily made Apple's billing practices relevant to the FTC's claim and Amazon's defenses.

Documents sought by the Requests are relevant to the claim and defenses in the Underlying Action. Screenshots or other documents sufficient to show Apple's disclosures and purchase protocols relating to in-app purchasing, the subject of Request No. 1, are probative of the public's understanding of in-app purchasing and potential controls. For example, evidence that Apple disclosed to its customers the availability of in-app purchases is probative of whether Amazon's customers were already aware of the opportunity for such in-app purchases. Likewise, evidence that Apple failed to sufficiently disclose opportunities for in-app purchases has a tendency to show that Amazon exceeded the fairness standards because Amazon disclosed to its customers opportunities for in-app purchases when it began offering them. *See* Hanson Decl. Ex. B (Compl.) ¶ 15.

Request Nos. 2 and 3 are also highly probative. Among the elements the FTC must prove to prevail on its claim is that consumers could not have reasonably avoided alleged injury through post-transaction mitigation. *See FTC v. J.K. Publications, Inc.*, 99 F. Supp. 2d 1176, 1202 (C.D.

Cal. 2000) ("Consumers may act to avoid injury before it occurs if they have reason to anticipate the impending harm and the means to avoid it, or they may seek to mitigate the damage afterward if they are aware of potential avenues toward that end." (quoting *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1365 (11th Cir. 1988)). As a result, Amazon's refund policies and practices are a key issue in this case, as reflected by the FTC's substantial discovery requests on the topic.

Request No. 2 asks for documents sufficient to show Apple's customer-service policies and practices relevant to in-app purchases. A comparison of the two companies' refund policies and practices is probative of whether any harm allegedly resulting from Amazon's practices was reasonably avoidable by its customers.

Request No. 3 seeks documents sufficient to show monthly data relating to Apple's refunds of in-app charges (e.g., refund rates and rates of refund requests that were granted). Comparison of Amazon's generous refund practices with Apple's practices and the data reflecting the rates of refunds denied is probative and could provide benchmarking for a market in its infancy. The FTC, in fact, has asked Amazon deponents about how Amazon's refund rates compared to other platforms' rates, such as Apple's. *See, e.g.*, Hanson Decl. Ex. I (Paleja Tr. 100:5-21), Ex. J (Rouse Tr. 104:23-106:13). Given the potential sensitivity of the requested refund data, Amazon is willing to restrict access to outside counsel only and so informed Apple's counsel on September 25. Hanson Decl. Ex. E.

The benefits of the requested discovery, which is highly relevant to the claim and defenses at issue in the Underlying Action, substantially outweigh any burden on Apple, as discussed below.

2. The Requests Are Not Overly Broad or Unduly Burdensome

Apple's objections that the Requests are overly broad and unduly burdensome lack merit. With respect to its objection that the Requests are "overly broad," the only explanation that Apple provides is that Request Nos. 2 and 3 seek information "unrelated to unauthorized in-app purchases by children." Hanson Decl. Ex. D, at 6, 8. Request No. 2 seeks information regarding Apple's customer service policies for in-app purchasing, including the means by which customers could seek refunds for unauthorized in-app charges. To the extent Apple has distinct refund

policies for unauthorized in-app purchases made by children, the distinction between Apple's general refund policy and its child-specific policy would be relevant. To limit any potential burden on Apple, Amazon also informed Apple that it was willing to limit the time period of Request No. 2 to the inception of the Apple App Store through December 31, 2013 (and potentially narrower, depending on the time frame covered by the documents and information provided to the FTC). *See* Hanson Decl. Ex. E.

With respect to Request No. 3, relating to refund data, Amazon has similarly narrowed the scope of its request to the time periods covered by information provided to the FTC (assuming such information was in fact provided to the FTC, as it almost certainly was). Hanson Decl. Ex. E. And since there is no way for a company such as Apple or Amazon to know whether a customer's claim that an in-app charge was made by a child is in fact true, Apple's overbreadth objection is likely academic. In any event, limiting the data as Apple suggests would not reduce Apple's burden in complying with Request No. 3 unless its data provided to the FTC was limited to unauthorized in-app purchases by children.

It is highly likely that all, or nearly all, of the documents sought in Request Nos. 1-3, as narrowed, were previously compiled by Apple and provided to the FTC. As a result, Apple's objection that the Requests are unduly burdensome is meritless.[4]

3. The Information Requested Is Not Publicly Available

Apple contends that Request Nos. 1 and 2 are unreasonably burdensome to the extent the information is publicly available. Hanson Decl. Ex. D, at 5. Although this information may at one time have been "public," there is currently no reasonable means for Amazon to obtain the requested, historical information from public sources. By contrast, the documents are readily available to Apple and likely have already been compiled and provided to the FTC.

Apple first claims that Amazon can obtain this information "[m]erely by using the in-app purchase feature in Apple's iOS products—which have been and remain available to the public."

[4] Amazon also limited the scope of Request No. 1 to the period March 1, 2011, through December 31, 2012, and clarified that "the request seeks to capture changes in the [in-app] purchase flow relevant to alleged unauthorized or accidental purchases, not cosmetic or other nonsubstantive changes." Hanson Decl. Ex. E.

In effect, Apple suggests that Amazon should obtain the requested information by downloading all prior versions of Apple's operating system ("iOS") and attempting to make in-app purchases on each one. Apple does not explain how this could be accomplished, and available information suggests it would be impossible, or nearly so.[5]

Apple next claims that Amazon should be required to piece information together from "public resources on the Internet, posted by Apple and others." Hanson Decl. Ex. D, at 5. As an example of these public resources, Apple lists two websites, both of which demonstrate the futility of Apple's suggestion. The first citation is to a page on Apple's own website describing Apple's *current* use restrictions for in-app purchasing.[6] But this provides no insight into Apple's historical practices, nor does Apple make such historical information available on its website. The second website that Apple cites is a blog containing a third-hand description of an update that Apple made to its in-app purchase disclosures.[7] While an examination of these and similar sources would provide fragments of information regarding Apple's in-app purchase business practices, it would be impossible to obtain the full historical information sought by the Requests.[8]

4. Apple's Confidentiality Concerns Can Be Addressed Through a Heightened Protective Order

Apple further objects to the Subpoena on the grounds that the Requests seek Apple's confidential business information. Many of the requested documents are public facing, but to the extent the Requests seek confidential business information, Amazon has from the outset indicated

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[5] *See* David Price, "It's here! How to upgrade to iOS 9 on iPhone and iPad," (Sep. 16, 2015), http://www.macworld.co.uk/feature/iosapps/ios-9-download-now-should-you-update-ipad-iphone-how-to-upgrade-ios-8-download-install-3495266/ ("[U]pgrading iOS tends to be essentially a one-way journey. It's always extremely hard (if not impossible) to go back to the previous version afterward"); Christopher Breen, "How to upgrade to iOS 8 (and downgrade to iOS 7)," (Sep. 17, 2014), http://www.macworld.com/article/2683693/how-to-upgrade-to-ios-8-and-downgrade-to-ios-7-if-you-regret-it.html ("Once you update your device to iOS 8 there's very little chance that you'll be able to revert to a previous version. Apple stops 'signing' (authorizing) older versions of iOS just days after releasing a new one. Reverting during this brief window is possible. . . . But once that window closes, there's no going back.").

[6] Hanson Decl. Ex. D, at 5 (citing https://support.apple.com/en-us/HT204396).

[7] Hanson Decl. Ex. D, at 5 (citing http://www.macrumors.com/2013/03/22/apple-adds-offers-in-app-purchases-disclosure-for-app-store-apps/).

[8] Also meritless is Apple's objection that each Request is an "improper interrogatory directed at a non-party." Hanson Decl. Ex. D, at 6, 7, 8. The Requests are narrowly tailored to seek documents *sufficient to show* the requested information; the Requests do not require Apple take any action that could be equated to an interrogatory response.

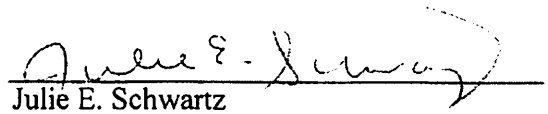
its willingness to stipulate to a heightened protective order. Amazon first informed Apple's counsel of Amazon's willingness to do so on September 1, 2015 (in connection with Apple-related information implicated by topics identified in Amazon's Notice of a Rule 30(b)(6) deposition of the FTC). Hanson Decl. ¶ 9. On September 25, Amazon further addressed Apple's confidentiality concerns by informing Apple's counsel that Amazon would agree to an outside-counsel-only restriction for refund-related documents produced in response to Request No. 3.[9] Hanson Decl. Ex. E.

VI. CONCLUSION

For the foregoing reasons, the Court should transfer this motion to the Issuing Court in the Western District of Washington. Alternatively, the Court should grant Amazon's Motion to Compel and order Apple to fully comply with the Subpoena, as narrowed by Amazon on September 25, 2015, within 14 days after entry of the Court's Order.

DATED: September 28, 2015

PERKINS COIE LLP

By: 
Julie E. Schwartz

Attorneys for Amazon.com, Inc.

[9] Because Apple signaled it would not be producing any documents, Amazon and Apple mutually agreed to reschedule the deposition of an Apple records custodian that was set for September 23. Hanson Decl. Ex. K. Amazon also informed Apple that it is willing to forego a deposition altogether if the FTC stipulates to authenticity and admissibility of documents produced by Apple. Hanson Decl. Ex. E. Amazon asks that the Court order Apple to produce a records custodian for a deposition at a mutually convenient time within 10 days after documents are produced, in the event that the FTC refuses to stipulate to authenticity and admissibility of the documents.